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Supreme Court, U. S.
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In the

Supreme Court of the United States

November Term

No. _____

JERRY L. MANKA, BARBARA R. MANKA, and RICKY A. MANKA,

Petitioners,

vs.

JERRY D. MARTIN, RODNEY SIMMONS, RICHARD HEWITT, E. L. POST, T. V. MIDDLE, C. F. JEFFERS, L. C. HOEFFER, FRANK T. BECKWITH, ROLAND J. BRUMBAUGH, ALAN CHARNES, and JOSEPH F. DOLAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF COLORADO

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioners have been effectively denied their rights under the United States Constitution, when the State of Colorado seized property *without* the required due process of law, in that the State seized property which was not identified or described on any warrant for distraint and *NO* court order, or oath or affirmations.

Whether the State failed to follow some of the required provisions of Colorado Revised Statute 39-21-114, authorizing any such seizure.

Whether the Petitioners have been effectively denied their RIGHTS under the Constitution of the United States as to Judicial Review, when the Colorado District Court avoided *ALL* the real questions of the case.

Whether the Petitioners have been denied their rights under the Constitution of the United States, when the Colorado Supreme Court treats them differently than the Supreme Court admits it would have treated recognized members of the Bar.

The Petitioners pray a Writ of Certiorari issue to review the judgment of the Colorado Supreme Court, entered on July 21, 1980. Final Post Trial Order issued August 22, 1980.

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CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Colorado in Case No. 80 SA 46, is set out in Appendix "A" at page 11. The decision of the Colorado District Court for the 4th Judicial District for El Paso County in Case Nos. 95403, 95470, 95490, 95791 and 95554, are set out in Appendix "B", at page 10.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257. Final order of Colorado Supreme Court Aug. 22, 1980.

STATEMENT OF THE CASE

The Petitioners were, at the time of the filing of the original cause of action, owners, operators, and employees of a small recreation vehicle business in Colorado Springs, Colorado.

The Respondents in the case apparently became very angry at the Petitioners for sending their letter complaining about the Respondents, to the Governor of Colorado. That letter was sent during the month of August, 1978. Respondents conducted an unprecedented seven year audit upon the books and records of the Petitioners, with the full cooperation, help and assistance of the Petitioners, Jerry and Barbara Manka.

That on or about January 27, 1976, Respondents mailed to the Petitioners, a "Notice of Deficiency", demanding approximately $10,000.00 in back taxes and penalties.

That the amount of the alleged taxes was unreasonable, and this assessment was arbitrary. The Petitioners sent a notice to the Respondents declaring same.

That on or about February 27, 1976, the Respondents sent the Petitioners a Demand for Payment, but failed thereafter, to timely respond to *any* communications from the Petitioners.

That on or about April 19, 1976, the Respondents seized, without due process, the building, business, new and used motorcycle inventory, and new and used parts inventory, with

NO process whatsoever, except color of law. *NONE* of the above was identified or described on a warrant or court order.

That contrary to statutes, the Respondents attempted to sell the seized property of the Petitioners, with *NO* notification, as required by statute, of the sale. Respondents failed and refused to state or notify the Petitioners of any anticipated sale, and additionally, were anticipating the sale of thousands of dollars worth of *NEW* motorcycles, which were floor planned, and *FULLY* mortgaged, without Notice to the lienholders.

That Colorado statutes forbid the sale of floor planned mortgaged merchandise for satisfaction of income taxes.

That Petitioners paid the fraudulent assessment in lieu of losing all their assets.

That on or about June 14, 1976, Petitioners had to pay the Respondents ransom to reclaim their property.

That on or about April 6, 1977, after a third audit, Respondents refunded *all* of the money collected as alleged taxes, proving that the arbitrary assessment was false, arbitrary, and erroneous.

That the District Court of Colorado failed to address itself to any question of unlawful seizure, denial of due process, or denial of equal protection of the law.

That the Colorado Supreme Court failed to address any issue posed by the Appellants, and by their own admission, clearly discriminated against the *Pro Se* Petitioners for being *Pro Se*.

REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENTS' ACTIONS DENIED PETITIONERS THEIR RIGHTS SECURED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Petitioners' business, inventory, and building, were seized without a warrant, in direct violation of the Fourth Amendment, under color of law.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV, United States Constitution.

To allow the State, the Respondents, to operate under COLOR OF LAW in seizures, effectively denies the citizen of those Constitutional rights.

II.

THERE IS A DENIAL OF DUE PROCESS WHEN THE CITIZEN MUST PAY MONEY, NOT DUE, TO SECURE RELEASE OF PROPERTY UNLAWFULLY SEIZED.

To secure the return of their property, Petitioners were forced to pay money (ransom) on the inventory and building, which had been seized without a Warrant for Distraint or Court Order.

III.

THE CONSTITUTION OF THE UNITED STATES GUARANTEES A CITIZEN THE OPPORTUNITY FOR HIS GRIEVANCES TO BE FULLY AIRED, AND ALL THE FACTS HEARD BY A JURY.

A Summary Judgment by a lower court, on the strength of a 1952 case, *Leiberhard v. Department of Revenue,* 123 Colo. 369, 229 P.2d 655 (1951), which is in effect being challenged at this time, in effect denies the Petitioners to their right to due process, and to the protection of the Constitution. *NO* appeal is afforded the taxpayer to any higher level of authority. That the appeal procedure, as supported in *Leiberhard,* supra, fails to offer *ANY* speedy or simple remedy. The appeal offered in the statute is a hoax as a taxpayer can ONLY appeal to the same person from whom the original jurisdiction was issued. The statute offers *NO* appeal at any higher level of authority.

IV.

ACTS OF THE STATE WHICH ARE NOT DONE PURSUANT TO THE CONSTITUTION OF THE UNITED STATES, AND WHICH DENY THE CITIZEN ALL HIS RIGHTS, ARE NULL AND VOID.

The assessment, seizure and collection was arbitrary and capricious; handled by incompetents who failed to recognize any of the provisions of Colorado Revised Statute 39-21-114, and many others.

CONCLUSION

For the reasons stated herein, the Petitioners respectfully pray this Honorable Court will grant the Writ to the Supreme Court of the State of Colorado.

RESPECTFULLY SUBMITTED this _____ day of November, 1980.

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APPENDIX "A"

IN THE SUPREME COURT OF COLORADO

NO. 80SA46

JERRY L. MANKA, BARBARA R. MANKA, and RICKY A. MANKA,	)	
Plaintiffs-Appellants,	)	
v.	)	
JERRY D. MARTIN, RODNEY SIMMONS, RICHARD HEWITT, E. L. POST, T. V. MIDDLE, C. F. JEFFERS, L. C. HOEFFER, FRANK T. BECKWITH, ROLAND J. BRUMBAUGH, ALAN CHARNES, and JOSEPH F. DOLAN,	)	JULY 21, 1980
Defendants-Appellees.	)	

Appeal from the District Court of El Paso County

Honorable Hunter D. Hardeman, Judge

EN BANC JUDGMENTS AFFIRMED

Jerry L. Manka, Barbara R. Manka,
and Ricky A. Manka,

Pro Se.

J. D. MacFarlane, Attorney General,
Richard F. Hennessey, Deputy Attorney General,
Mary J. Mullarkey, Solicitor General,
Billy Shuman, Assistant Attorney General,

Yegge, Hall & Evans,
Carol M. Welch,

Attorneys for Defendants-Appellees.

JUSTICE LEE delivered the opinion of the Court.

This appeal [1] is from summary judgments entered in favor of appellees, the Colorado Department of Revenue and certain named agents, in five cased filed in August and September 1977 in the District Court of El Paso County by appellants, Jerry L., Barbara R., and Ricky Manka. We affirm.

The actions arose from the levying and collection of sales, use, and income taxes by the Colorado Department of Revenue (the Department) in 1976 from appellants, individually and under the business names of Central Cycle Shoppe and Track and Wheel Equipment Company.[2] In March 1978, on the motion of the appellees, the district court consolidated the cases into No. 95403. The trial date was set for August 1979.

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[1]Although appellants filed their appeal in the court of appeals, because in their briefs they challenged the constitutionality of certain state statutes, the court of appeals requested that this court determine the proper jurisdiction. We ordered the appeal transferred to this court pursuant to section 13-4-102, C.R.S. 1973.

[2]The summary judgment order contained a brief description of each complaint. We here summarize the descriptions.

The appellants Jerry L. and Barbara R. Manka brought the following actions against appellees:

In No. 95403, plaintiffs sought damages arising from action of appellees in refusing to refund $1,014.23 in taxes which appellants paid under protest.

In No. 95470, plaintiffs sought damages arising from actions of the appellees in seizing and holding their automobile. This action is apparently based on unlawful seizure and negligence.

In No. 95490, plaintiffs sought relief from, and compensation for damages arising from, an allegedly fraudulent and unlawful audit by appellee Jeffers.

In No. 95491, plaintiffs sought damages arising from actions of appellees in allegedly unlawfully seizing their pickup truck.

All three appellants in No. 95554 sought damages arising from an allegedly illegal seizure of their personal property. This is the only suit in which appellant Ricky A. Manka is named as plaintiff.

On July 31, 1979, the district court granted summary judgment in favor of appellees in three of the cases (Nos. 95490, 95491, and 95554).

The court also granted partial summary judgment to appellees in the remaining two cases. The partial summary judgment limited appellants' possible recovery in No. 95403 to the amount of the refund allegedly due, plus interest, and, in No. 95470, to the market value plus interest of any automobile parts proven to have been lost from the automobile due to appellees' conduct. These two cases remained consolidated and were tried to a jury in August 1979. The jury returned a verdict in favor of the appellees in No. 95470 and in favor of the appellants in No. 95403 in the amount of $535.62. Appellants failed to file any motion pursuant to C.R.C.P. 59 for a new trial or an amended judgment. They did, however, timely file a notice of appeal from the summary judgments.

The record before this court does not contain any direction by the district court that the partial summary judgment granted to the appellees in cases Nos. 95403 and 95470 be made a final judgment for purposes of appeal. C.R.C.P. 54(b).

The issues on appeal may be stated as follows: (1) whether sections 39-22-601 *et seq.* and sections 39-21-103, 104, 105, 113, and 114, C.R.S. 1973, are unconstitutional; and (2) whether the trial court erred in granting appellees' motion for summary judgments in Nos. 95490, 95491 and 95554; erred in granting appellees' motion for partial summary judgment in Nos. 95403 and 95470; and erred in denying appellants' motion for summary judgment in all five cases.

I.

Appellants raise as an issue on appeal the constitutionality of the various statutes, all of which relate to the procedures to be followed concerning tax claims and the administration of the Colorado Department of Revenue.

Having carefully examined the record, and, in particular, the complaints, we can find no indication that the constitutionality of any of these statutes was raised as an issue at the trial level. Questioning the constitutionality of a statute for the first time in an appellate brief will not successfully raise the

issue for review by this court of appeal. *Hessling v. Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *Johnson v. People*, 96 Colo. 175, 40 P.2d 615 (1935); *Loan Company v. Ira*, 75 Colo. 379, 226 P. 136 (1924). We find no reason to depart from this rule in this appeal.

Appellants claim that they believed they were identifying the issue at the trial level by citing 42 U.S.C. 1983 in their complaints. A mere recitation of 42 U.S.C. 1983, a federal statute recognizing a cause of action in a citizen of the United States arising from a deprivation of constitutional rights, is not sufficient to identify as an issue the constitutionality of particular Colorado statutes.

II.

We next consider appellants' claim that the trial court erred in granting summary judgments in favor of appellee.

(A) Actions Nos. 95403 and 95470

As indicated above, the trial court granted partial summary judgments in actions Nos. 95403 and 95470. In doing so, the court ruled that, as a matter of law, appellees prevailed except as to appellants' claim for a refund and for reimbursement for the value of the missing auto parts. In neither of these cases was the action terminated by the order of partial summary judgment.

When a summary judgment disposes of less than the entire action, the judgment is not final unless the trial court expressly determines that there is no just reason for delay and directs the entry of a final judgment. C.R.C.P. 54(b). If a trial court does not make such a determination, the court's decision "shall not terminate the action as to any of the claims * * *." C.R.C.P. 54(b). Because partial summary judgments in actions Nos. 95403 and 95470 were not final judgments, they are not appealable. The rights and liabilities of the parties remain yet to be determined. *Stillings v. Davis*, 158 Colo. 308, 406 P.2d 337 (1965).

Furthermore, after these two cases were tried and the parties' rights and obligations were determined, appellants

could have, and indeed should have, moved for a new trial or an altered or amended judgment under C.R.C.P. 59. Because they did not timely file such motions and allow the trial court an opportunity to review its possible errors, appellants are now barred on appeal from asserting error by the trial court. *Rueckhaus v. Snow*, 167 Colo. 51, 445 P.2d 577 (1968).

We dismiss the appeal from the partial summary judgments in actions Nos. 95403 and 95470.

(B) Action No. 95490

The district court in its summary judgment order took judicial notice of a 1976 civil action, *Manka v. Martin*, Civil Action No. 92349, and ruled that the decision there barred the instant action under the doctrine of res judicata. We agree with that ruling.

In the earlier action (No. 92349), Jerry L. and Barbara R. Manka had sought and received a temporary restraining order from the El Paso County District Court against the Department and, specifically, against Jerry Martin, a collection and enforcement agent, and Joseph F. Dolan, the Director of the Department. The order prohibited further seizure and holdings of the Mankas' property. It was based upon their allegations that the value of the properly already seized by the Department exceeded the amount of their tax deficiency, and that the assessment of the tax deficiencies was unlawful. Following a hearing, the trial court vacated the temporary restraining order and denied the request for relief in the nature of mandamus and permanent injunction. The court did so because it found that, contrary to the assertions of the Mankas, they had failed to follow the proper administrative appeal procedure by requesting a hearing pursuant to section 39-21-103, C.R.S. 1973, as set forth in the notices of deficiency which they had received.[3] No timely appeal was taken from the ruling in that action.

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[3]A taxpayer's failure to pursue the proper administrative courses available to him as possible remedies bars him from later attacking the final determination and notice of tax deficiency. *Leibhardt v. Revenue Department*, 123 Colo. 369, 229 P.2d 655 (1951).

The district court also noted that the complaint in action No. 95490 was based upon the same alleged facts as in the 1976 complaint (No. 92349) and that the causes of action in both cases were identical, *viz.*, an alleged wrongful audit.[4] Based upon these identities of fact and claims, the district court ruled that the present action must be dismissed under the doctrine of res judicata.

In *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973), this court discussed the doctrine of res judicata.

> "* * * The doctrine holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. It bars relitigation not only of all issues actually decided, but of all issues that might have been decided. It requires an identity of parties or their privies (*Restatement, Judgments* §§ 83-92 (1942)), as it would be unfair to preclude a party from litigating an issue merely because he could have litigated it against a different party."

It is not significant that the named defendants in the instant case include individual agents and employees of the Department not named in the earlier case. The doctrine of res judicata does not require that all parties to the previous suit be parties to the subsequent suit, and vice versa, but only that the party against whom the doctrine is asserted have been a party or in privity with a party to the prior adjudication on the same claim. *Pomeroy v. Waitkus, supra; Murphy v. No. Colo. Grain*, 30 Colo. App. 21, 488 P.2d 103 (1971).

Jerry L. and Barbara R. Manka were plaintiffs in both cases Nos. 92349 and 95494. The alleged causes of action in each were identical. The court in No. 92349 decided the issue of

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[4]The only factual difference between the two actions is that one distraint warrant complained of in the instant case was issued after the temporary restraining order was vacated in the earlier case. However, since the same facts served as the basis for the issue of all the distraint warrants, we agree with the trial court that this factual difference is of no consequence to the present issue.

a wrongful audit against them. They are therefore barred under the doctrine of res judicata from relitigating the issue in this case. Summary judgment was properly ordered in case No. 95490.

(C) Action No. 95491

In this action, appellants apparently allege that the Department's seizure of their pickup truck from the public streets on June 11, 1976, was unlawful. The allegations in their complaint, and amendments to the complaint, are far from clear. The district court in its summary judgment order summarized appellants' argument as asserting that the distraint warrant was "not directed toward it [the truck]." To the extent that the Mankas are arguing that the Department lacked authority to assess their tax liability and to pursue collection procedures by seizing the truck, we refer to part II(B) of this opinion and hold that the doctrine of res judicata supports the district court's grant of summary judgment against appellants.

To the extent that appellants are arguing that the seizure of the truck was invalid as a violation of the Fourth Amendment of the United States Constitution, we do not agree. It is plain that warrantless seizures of automobiles from public streets by tax enforcement authorities are not violative of the Fourth Amendment. *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L.Ed.2d 530 (1977). Consequently, even if the distraint warrant were "not directed toward" the truck, the fact is immaterial to the legality of the seizure.

Appellants cite numerous other provisions of the United States Constitution which they claim have been violated by the Department's seizure of their property. We can find no merit to these arguments.

We affirm the district court's summary judgment in favor of appellees in action No. 95491.

(D) Action No. 95554

All three appellants were plaintiffs in this action. They claimed that seizure of a Dodge truck and other personal property by the Department, on April 19, 1976, was unlawful.

Appellants argue on appeal that the illegality resulted from (1) seizure of property belonging to Ricky A. Manka pursuant to warrants concerning Jerry and Barbara Manka, and vice versa, and (2) the Department's failure to establish ownership of the seized property.

The district court found, on the basis of the pleading, that all assets of the businesses were owned by Jerry L. and Barbara Manka, and that Ricky Manka, as holder of a sales tax license for one of the businesses, was at most a nominal plaintiff. Indeed, there are no allegations in the complaint or amendments that Ricky Manka was the owner of the property seized pursuant to distraint warrants issued in the names of Jerry and Barbara Manka. Neither is there any support offered for the argument that the Department's seizure of the property was unlawful because the Department failed to establish the ownership of the property seized. Rather, the pleadings are replete with conclusionary statements and devoid of factual allegations necessary to a successful statement of a claim for relief.

Because appellants have not presented any discernibly meritorious argument concerning the unlawfulness of the seizures, and because we see no genuine issue as to any material fact, we affirm the district court's summary judgment dismissing action No. 95554.

In conclusion, we note that appellants elected to proceed pro se both at the trial and appellate level. We repeat what we have said in similar circumstances:

> "* * * A litigant is permitted to present his own case, but, in so doing, should be restricted to the same rules of * * * procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded." *Knapp v. Fleming*, 127 Colo. 414, 258 P.2d 489 (1953).
>
> "* * * If a litigant, for whatever reason, sees fit to rely upon his own understanding of legal principles and the procedures involved in the courts, he must be prepared to accept the consequences of his mistakes and errors. * * *" *Viles v. Scofield*, 128 Colo. 185, 261 P.2d 148 (1953).

The appeal from the partial summary judgments in actions Nos. 95403 and 95470 is dismissed.

The judgments are affirmed in actions Nos. 95490, 95491, and 95554.

JUSTICE ERICKSON and JUSTICE DUBOFSKY do not participate.

APPENDIX "B"

IN THE DISTRICT COURT WITHIN AND FOR

THE COUNTY OF EL PASO AND STATE OF COLORADO

Civil Action Nos. 95403, 95470, 95490

94591 and 95554

Division No. 6

JERRY LEE MANKA, BARBARA RUTH MANKA and RICKY ALAN MANKA,	)	
Plaintiffs,	)	SUMMARY JUDGMENT
vs.	)	
DEPARTMENT OF REVENUE, STATE OF COLORADO, JOSEPH F. DOLAN, ALAN CHARNES, ROLAND J. BRUMBAUGH, FRANK L. BECKWITH, T. V. MIDDLE, JR., JAMES DAVIS, E. L. POST, JERRY D. MARTIN, ROD SIMMONS and C. F. JEFFERS,	)	
Defendants.	)	

Motions for Summary Judgment filed by both Plaintiffs and the Defendants came on for hearing on June 15, 1979; Plaintiff Ricky A. Manka not appearing; Plaintiffs Jerry L. Manka and Barbara R. Manka appeared pro se, and Defendants appeared by Carol M. Welch of Yegge, Hall & Evans, and the Court having reviewed each file, the motions and supporting briefs, and considered the arguments of counsel, would find and conclude as follows:

1. The above five cases were filed between the period August 17, 1976 and September 9, 1976, and were assigned to various divisions of this Court. They all arise or result from efforts on the part of the Department of Revenue to collect sales, use and income taxes alleged to be due from the above mentioned Plaintiffs individually and under the business names of Central Cycle Shoppe and Track & Wheel Equipment Co. In four of the actions, Jerry L. Manka and Barbara R. Manka (herein designated Plaintiffs unless otherwise indicated) are the sole Plaintiffs; in Civil Action No. 95554, Ricky Alan Manka joined with them as a party Plaintiff. On motion of the Defendants, all cases were ordered consolidated into 95403 by Judge Joseph Cannon and were set for trial on March 27, 1978. Thereafter and on motion of Plaintiffs, Judge Cannon disqualified himself, and all five cases were assigned to this division.

2. A short summary of Plaintiffs' claim for relief in each case would be helpful in resolving the issues raised by the subject motions. Such summary identified by case number and the original division to which it was assigned is as follows:

No. 95403 (Div. 9 — Judge Cannon) Plaintiffs seek a refund of approximately $1,014.23 from monies paid to the Department of Revenue to secure the release of their property seized under the distraint warrants. They assert that $8,135.98 has already been returned, but the above amount is still owing as well as damages for its wrongful detention.

No. 95470 (Div. 1 — Judge Calvert) Plaintiffs seek actual damages of $1,824.00 as well as punitive damages alleged to have been sustained on or about April 19, 1976, after Defendants seized and held their 1967 Chevrolet Nova Coupe; they assert that while the automobile was in their custody, Defendants failed to properly care for same, and as a result, various parts were removed by unknown parties to Plaintiffs' damages as aforesaid. This action appears to be based on an initial unlawful seizure and later negligence.

No. 95490 (Div. 4 — Judge Rhodes) Plaintiffs sought damages against Joseph F. Dolan, Director of the Department of Revenue, and various other agents of the Depart-

ment, including C. F. Jeffers, alleged to be a result of a fraudulent and unlawful audit performed by Jeffers. The Director and various other Defendants were joined on the theory that they "acted on" the unlawful audit of Jeffers; Judge William Rhodes prior to the consolidation of the cases dismissed all Defendants in the matter, except Jeffers, the latter being retained under the theory that the Amended Complaint might state a claim for tortuous interference with Plaintiffs' business.

No. 95491 (Div. 10 — Judge Baker) Plaintiffs seek actual damages in the amount of $12.00 as well as specified punitive damages they allege was the result of an unlawful seizure of their 1967 Chevrolet El Camino pickup while parked on a public street. In argument, Plaintiffs state that the distraint order was "not directed toward it." On Defendants' motion, the State of Colorado was dismissed, but the individual Defendants were retained by Judge Baker in December, 1977. Defendants had asserted the doctrine of res judicata by reason of an earlier case filed in Division 8, but Judge Baker ruled that such case had different parties and the doctrine would not apply.

No. 95554 (Div. 10 — Judge Baker) All three Plaintiffs seek damages for unlawful seizure of a 1973 Dodge truck and the businesses located at 2844 Delta Drive. They allege that the distraint warrants issued in the names of Jerry L. Manka and Barbara R. Manka individually and as Central Cycle Shoppe and distraint warrants issued in the name of Ricky A. Manka, Track & Wheel Equipment Co. were all served on Plaintiff Jerry L. Manka on April 19, 1976; that none were served on Ricky A. Manka.

3. In all cases, Plaintiffs allege "Jurisdiction is conferred by the 1973 Revised Statutes and Title 42 of the U.S. Code, Section 1983, 1985, 1986 and 28 U.S.C. 1331-2680."

4. In regard to a possible claim under federal law, it is noted that Plaintiffs allege in later pleadings that cases numbered 95490, 95491 and 95554 involve only the issue of "whether the seizure was lawful or unlawful under the 4th Amendment."

5. Plaintiffs' Motion for Summary Judgment is directed to all cases, except 95403. As to the remaining four, they assert that Defendants are liable as a matter of law for damages, both actual and punitive, from the time of the initial wrongful audit by Jeffers (No. 95490), which the other Defendants acted on, through the unlawful seizure of their car, trucks and businesses. In regard to the distraint warrants, they argue that no one can seize property without a court order; that prior to issuance, a distraint warrant must describe the specific property to be seized, and, even if valid, the warrants were not properly served.

6. Defendants' Motion for Summary Judgment requests dismissal of Action Nos. 95490, 95491 and 95554. In addition, they request that any claim for damages in cases numbered 95403 and 95470 be limited to actual out-of-pocket losses. As grounds for same, Defendants allege that Plaintiffs' claims for damages are barred as a matter of law for reasons asserted in their brief, including qualified immunity, res judicata and collateral estoppel. In support of the latter two doctrines, they cite Civil Action No. 92349 filed by these Plaintiffs in Division 8 (Judge Donald Campbell) on April 23, 1976, following seizure of their property pursuant to distraint warrants; they further allege that Plaintiffs sought in the Division 8 case an injunction to prevent further seizure of any property, for an order requiring the named Defendants to grant Plaintiffs a hearing pursuant to the provisions of 39-21-103 (2) and to require the Defendants to release property already seized.

7. This Court will take judicial notice of Civil Action No. 92349 in considering its effect from the standpoint of res judicata and collateral estoppel on the instant cases. A review of this file discloses that Plaintiffs while represented by counsel did file a suit against Joseph F. Dolan, Director of the Colorado Department of Revenue, and Jerry Martin as a Department of Revenue collection and enforcement officer, requesting the relief described in the preceding paragraph; that as grounds for such relief, Plaintiffs alleged in their Complaint that one C. F. Jeffers conducted an audit of their books, which audit was arbitrary, capricious and without basis in fact; the Complaint further alleged that following the audit, Plaintiffs received Notices of Deficiency, at which point they made a timely request for an administrative hearing to review the correctness of any claimed deficiency, which request was

denied in violation of their Constitutional rights. The Complaint also contains an allegation that between April 19, 1976 through April 22, 1976, pursuant to distraint warrants issued by Defendant Joseph F. Dolan, Defendant Jerry Martin seized personal property of Plaintiffs valued at $31,115.00, which included the assets of Track & Wheel Equipment Co., "a partnership owned by Plaintiff." At the request of Plaintiffs and based on their allegation of unlawful tax assessment, Judge Campbell, on April 23, 1976, entered an order temporarily restraining the Defendants from seizing any further property of Plaintiffs or selling any property then under distraint until a hearing could be conducted. The file discloses that following such hearing, Judge Campbell entered an order on May 19, 1976, wherein he expressly found that following receipt of the Notices of Deficiency, Plaintiffs had not requested a hearing "pursuant to the requirements of C.R.S. 1973, 39-21-103 (2)(3)." He concluded by denying Plaintiffs' request for relief in the nature of mandamus and for permanent injunction. The temporary restraining order was also dissolved. No Motion for Rehearing or for New Trial was filed as required by the Civil Rules, nor was any appeal taken, and the above order of May 19, 1976 thus became final. On May 22, 2979, Plaintiffs filed a lengthy Petition, requesting that the case be reopened and that the Court entertain a Motion for a New Trial, which request was denied on June 6, 1979.

8. That the following is readily apparent: That the instant case for damages against C. F. Jeffers (95490) is based on his alleged wrongful audit, which audit was also the basis of Plaintiffs' claim against Jeffers's superior, Joseph F.. Dolan, Director, in the Division 8 case (Campbell); that all but one of the distraint warrants involved in the alleged unlawful seizures in the instant cases were issued prior to the filing of the Division 8 case. The remaining warrant was issued after the temporary restraining order was dissolved.

9. That Plaintiffs' Motion for Summary Judgment should be denied for the reason hereinafter stated.

10. In determining whether Defendants are entitled to Summary Judgment as well as Partial Summary Judgment, it would be well to look to prior case law that deals with similar issues. In *Leibhart vs. Revenue Department*, 123 Col., 369, 229

P.2d, 655, the taxpayer also alleged numerous alleged irregularities on the part of the Department of Revenue prior to the final determination of tax. As in the instant case, the taxpayer, upon receipt of the Notices of Deficiency, made no request for an administrative hearing, nor was an appeal made to the District Court following a final determination. On page 656 of the Pacific Reporter, the Supreme Court states:

> "Under the statute, the director's decision became final 30 days after notice thereof was mailed to the taxpayer, and it thereupon became no longer subject to judicial review."

On the following page, the Court states:

> "The statute affords the taxpayer a plain, speedy and adequate remedy and full opportunity to be heard as to the quantum of the tax and the alleged irregularities leading up to the fixation of tax liability. Failure to interpose the objections now made in the manner and at the time prescribed by law, and to exhaust the statutory remedies afforded the taxpayer, constitutes a waiver of such objections which cannot now be asserted."

Leibhart clearly establishes that if the taxpayer fails to request an administrative hearing or a later court review, the director's decision becomes final. Judge Campbell, of course, decided that no request was made, and the next question to be resolved is whether such ruling back in 1976 would now bar Plaintiffs under the doctrine of res judicata from proceeding against the present Defendants for any alleged wrongful acts from the time of Jeffers's audit through the seizure of all property.

11. It is a general rule of law that a former judgment may be pleaded as a bar by and only by the parties to the action and their privies. As previously mentioned, in Civil Action No. 92349, only Joseph F. Dolan, Director, and Jerry Martin were named as Defendants. The instant cases name these same two individuals as well as Alan Charnes, the present Director, and various other agents and employees of the Department of Revenue.

A search of the law reveals there are certain exceptions to the rule that the parties or their privies must be the same. In 50 C.J.S., 277, Section 756, Judgments, and in discussing res judicata, appears the following:

> " . . . .that privity and mutuality are not necessary where the liability of the defendant asserting the plea is dependent on, or derived from, the liability of one who was exonerated in an earlier suit brought by the same plaintiff on the same facts and it has been recognized that the courts have seized on slight evidence of relationship or privity on which to base a mutual estoppel."

In the section following the above, entitled "Persons Connected in Interest or Liability" appears the following:

> "Principal and agent. A judgment for plaintiff in an action against a principal may be taken advantage of by the agent as a bar to an action against him for the same cause."

> "Master and servant. While a person injured by the tort of a servant may bring suit against either the master or servant, a recovery against the master has been held a bar against the servant . . . . . and where plaintiff in an action against an employee is defeated on the merits, the judgment is generally regarded as a bar to a subsequent action against the employer, *and vice versa* . . . . ." (emphasis added)

See also 46 Am Jur 2d, 731, Section 570.

12. Another rule of law that is applicable to this situation is noted under the same heading in C.J.S. at page 102.

> "All other essential elements being present, a judgment operates as a bar, not only as to every matter adjudicated, but as to every other matter which might with propriety have been determined in that same action."

The above appears to be the rule in Colorado. See *Pomeroy vs. Waitkus*, 517 P2d., 396.

There also appears to be substantial law to the effect that a governmental body and its officers, boards, commissions, agents and representatives form but a single entity with respect to application of the rule of res judicata; that under this theory, exoneration of the superior would also relieve the agent, even though not named in the original suit. See 50 C.J.S. 335, Section 796.

13. In the Division 8 case, it is apparent that Jeffers's alleged tortuous act, a wrongful audit, is the basis of Plaintiffs' cause of action against his superior, Joseph F. Dolan, the Director. Under the authority cited above, the Court would conclude that the mere adding of additional agents of the Department of Revenue as Defendants or the request for damages as opposed to injunction and mandamus would not prevent former Civil Action No. 92349 from operating as a bar under the doctrine of res judicata to all claims for relief in the instant cases from the time of the audit through the seizure of all property by virtue of the distraint warrants. The addition of Ricky Manka as a party Plaintiff in No. 95554 would not change the above result. As shown by the pleadings, Jerry Manka and Barbara Manka owned all of the assets of the two businesses, namely Central Cycle Shoppe and Wheel & Track Equipment Co. Ricky Manka, as holder of the sales tax license in the latter business would be, at most, a nominal Plaintiff.

14. The doctrine of res judicata as aforesaid would bar all relief requested in Case Nos. 95490, 95491 and 95554, and Summary Judgment should be granted to Defendants accordingly; further, that in Case No. 95403 it would appear that any recovery should be limited to the amount of the refund, if any, as may be established by competent testimony, plus any interest or other relief that may be expressly provided by statute; further, that in Case No. 95470, any recovery would be limited to market value of any parts at the time of removal while the 1967 Chevrolet Nova Coupe was being distrained by the Department of Revenue, plus interest.

15. In regard to the denial of Plaintiffs' Motion for Summary Judgment, the following conclusions are pertinent: A distraint warrant as authorized under 39-21-114, as amended, unlike a criminal search warrant, is directed to any and all property of the taxpayer that may be located and is

issued by the Executive Director of the Department of Revenue, as opposed to the Court. There is no statutory requirement that the undersigned has been able to locate that all property be seized at one time or on one day or that only one sale be conducted so long as the necessary time elapses between notification to the owner and the publication of the notice. Here no sale ever took place, and any other irregularities are moot.

16. That in regard to Plaintiffs' right to relief under the U.S. Constitution or any federal statute by virtue of the seizure of their property, this Court would conclude that such seizures were lawful since Plaintiffs failed to avail themselves of the administrative and court remedies provided by the laws of this State prior to the issuance of the distraint warrants.

17. The Court notes that this case is set for trial to a jury on August 14, 1979, at 9:30 a.m. If the parties are still unable to resolve the remaining issues as delineated above, such trial will stand.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That Plaintiffs' Motion for Summary Judgment be denied for the reasons stated above.

2. That Defendants' Motion for Summary Judgment be granted as to cases numbered 95490, 95491 and 95554; that Partial Summary Judgment be granted as to cases numbered 95403 and 95470 to the extent above outlined.

DONE in Chambers this 31st day of July, 1979.

HUNTER D. HARDEMAN
District Judge